Supreme Court, U.S.
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No. 85-373

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

CHARLES REED AND ROLAND DUTY,
Petitioners,

v.

JAMES TERRELL, SUE RAYBOLD, BILL LOGUE
JOE JOHNSON, AND THE
STATE BAR OF TEXAS,
Respondents.

PETITIONERS REPLY TO RESPONDENT SUE RAYBOLD'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BEST AVAILABLE COPY

REPLY TO OPPOSITION

Respondent Raybold's opposition is based on argument and authorities which are not on point with the facts of this case.

Petitioners, as state-court defendants in an action based solely on an arbitrary state statute, had no choice between a state and federal forum, had no basis for appealing state-court judgments without raising their federal claims in state court, and could not have raised their federal claims in state court without forfeiting their right to a federal forum. In addition, the opposition cites no authority, and there is none, for the proposition that any person is ever required to submit his federal claims to be decided by the same state officials accused of depriving those federal rights.

Respondent Raybold's attorneys also made false statements in the opposition

which appear designed to prejudice this Court against Petitioners, and which reflect contempt for this Court.

For these and the other reasons discussed herein, this Court should reject Respondent Raybold's opposition.

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OPINION BELOW

The judgments and opinions in the courts below are attached as appendices to petitioner's petition.

STATEMENT OF THE CASE

Respondent Raybold has alleged that the Statement of the Case as presented in the original petition contains "material largely outside the record", "slanted and argumentative presentations of the proceedings below", "misstatements of the state law", "facts assumed but not in evidence", and "other improper material", yet makes no effort to specify where our Statement of the Case is in error.

We contend that the original statement of the case is correct.

I.

V. T. C. A. FAMILY CODE SECTION 11.18(a) IS ARBITRARY AND IS APPLIED ONLY AGAINST MEN.

Respondent Raybold argues that Family Code Section 11.18(a) "is not arbitrary, and does not apply only against men."

Respondent Terrell stated in his original answer to this complaint:

> ". . . this Defendant admits that Section 11.18(a) of the Texas Family Code contains no standards governing its application. . . "

In addition, Texas courts have consistently held that application of Section 11.18(a) in a particular case is left to the sole discretion of the court. Drexel v. McCutcheon 604 S. W. 2d 431.

It is the arbitrary nature of Section 11.18(a) that allows it to be applied only against men. Respondent Raybold's argument that it "does not apply only against men" is irrelevant, since this Court ruled that

a law, fair on its face, is unconstitutional if it is applied "with an evil eye and an unequal hand". Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064.

Thus, this Court should reject Respondent Raybold's unsupported argument that Section 11.18(a) is not arbitrary, and her irrevelant argument that Section 11.18(a) does not apply only against men.

II.

42 U. S. C. SECTION 1983 WAS INTENDED TO ENFORCE THE PROVISIONS OF THE FOURTEENTH AMENDMENT AGAINST STATE ACTION, WHETHER THAT ACTION BE EXECUTIVE, LEGISLATIVE OR JUDICIAL.

Respondent Raybold bases her opposition on the argument that Section 1983 does not apply against state judicial action. This Court rejected that argument in Mitchum v. Foster 407 U. S. 225, 92 S. Ct. 2151; Lugar v. Edmondson Oil, 102 S. Ct. 2744; Haring v. Prosise, 462 U. S. 306, 103 S. Ct. 2368;

Pulliam v. Allen, 104 S. Ct. 1970, and countless other cases.

This Court declared in Gomez v. Toledo, 446 U. S. 635, at page 640:

> "by the plain terms of Section 1983, two--and only two--allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law."

The opinion of the Fifth Circuit in this case did not find an absence of either of these elements in the present case.

Respondent Raybold pretends that Petitioners are attacking the facts found by state courts, which serve as the basis for the state-court judgments in this case. Petitioners do not seek federal review of any fact found by any state court--Petitioners' claim is that facts are irrelevant to state-court judgments

under Family Code Section 11.18(a). Petitioners do not claim that Section 11.18(a) was applied other than intended against them--Petitioners claim is that it was applied exactly as intended.

This Court ruled in England v. Louisiana Board of Medical Examiners, 375 U. S. 411, 84 S. Ct.4671, at U. S. 419, that:

> ". . . if a party freely and without reservation submits his federal claims for decision by the state courts,. . . he has elected to forgo his right to return to (Federal) Court. . ."

Respondent Raybold argues the opposite; that Petitioners forfeited their federal claims by not raising them in state court.

Respondent Raybold argues that Petitioners' only avenue for a federal review of their federal claims is to run the obstacle course of the hostile state appeals process and then request a writ of certiorari from this Court. (This argument

ignores the right to appeal to this Court under 28 U.S.C. 1257(2) where the validity of a state law is at issue.) This Court declared in England, supra, at U.S. 416, that:

> "But such review. . . is an inadequate substitute for the intial District Court determination to which the litigant is entitled in the federal courts."

This rule is particularly applicable to the present case where state-court judges are accused of violating constitutional rights.

Respondent Raybold has failed to advance any reason why Mitchum v. Foster, supra, and Haring v. Prosise, supra, do not apply in this case. This Court stated in Haring, at U.S. 313, that:

> "In federal actions, including Section 1983 actions, a state-court judgment will not be given collateral estoppel effect where the party against whom an earlier court decision is

> asserted did not have a full and fair opportunity to litigate the claim or issue decided by the court."

Petitioners did not have a "full and fair" opportunity to litigate when the arbitrary Section 11.18(a), against which there is no defense, was applied against them.

Respondent Raybold cites no authority for her argument that a judgment, based solely on an unconstitutional state statute, is not void. Her argument that unconstitutional statutes yield valid judgments should be rejected.

Respondent Raybold's argument that federal declaratory relief cannot be invoked to prevent enforcement of a final state-court judgment is also unfounded. See Henry v. First National Bank of Clarksdale, 595 F. 2d 291,(Fifth Circuit), and Gresham Park Community Organization v. Howell, 652 F. 2d 1227.(Fifth Circuit)

Respondent Raybold argues that the Fifth Circuit did not rule that Petitioners' claim against the State Bar of Texas was not actionable under 42 U.S.C. Section 1983 and 1985. Petitioners raised this claim in District Court, and on appeal. Since Petitioners' claims, in their entirety, were rejected by the Fifth Circuit, the claims against the State Bar under Section 1983 and 1985 were also rejected.

Respondent Raybold's opposition cites numerous cases which are not on point with this case for a variety of reasons. In these cases, the litigants were state-court plaintiffs who, failing there, attempted to relitigate the same issues in federal court based upon the same operative facts.

For the foregoing reasons, this Court should reject Respondent Raybold's argument that state judicial action precludes a 42 U. S. C. Section 1983 suit.

III.

THE FIFTH CIRCUIT DID NOT REPRIMAND PETITIONERS AT ANY TIME, NOR DID THE FIFTH CIRCUIT FIND PETITIONER'S CLAIMS TO BE FRIVOLOUS.

Respondent Raybold's attorneys state in her opposition that Petitioners "have been reprimanded by the Fifth Circuit on oral argument". This statement is completely false, has no basis whatever in fact, appears designed to prejudice this Court against Petitioners, and reflects contempt for this Court and its lofty purposes.

The attorneys for both Respondents Terrell and Raybold made similar false statements reflecting upon the character of Petitioners during oral arguments before the Fifth Circuit. This Court should apply appropriate sanctions against Respondent Raybold's attorneys for this contemptable and inexcusable behavior.

Respondent Raybold cites Hagerty v. Succession of Clements, 749 F.2d. 217, as the basis for her argument that Petitioner's claims are frivolous. Petitioners appeal to the Fifth Circuit was filed four months before Hagarty, yet judgment in this case was rendered five months after judgment in Hagarty. Oral arguments were ordered in this case at the same time Hagarty was being summarily disposed of.

The Fifth Circuit did not find, or even imply, that Petitioners' claims were frivolous. Instead, this case was one of only 42% of the cases filed in the Fifth Circuit which proceed to oral arguments. At the time judgment was rendered in this case by the Fifth Circuit, this case had been in the Fifth Circuit for 16 months and was one of the oldest cases on its docket. It also took the U. S. District Court 18 months to proceed to judgment in this case.

Further, the Fifth Circuit, in its opinion, did not find an absence of either of the two essential elements listed in Gomez v. Toledo, supra, for a 42 U. S. C. Section 1983 cause of action.

For these reasons, Respondent Raybold's claim that Petitioners' petition is frivolous is unfounded and should be rejected by this court.

CONCLUSION

Based on the foregoing arguments and authorities, the petitioners pray that Respondent Raybold's Opposition to our Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied and that our Petition be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Roland Duty, hereby certify that a true copy of Petitioners Reply to Respondent Raybold's Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been mailed, United States mail, postage prepaid, to counsel of record for each respondent therein on this 12th day of October, 1985, properly addressed to each as follows:

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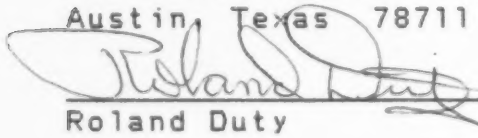

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